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9 GREENBERG TRAURIG, LLP,
GREENBERG TRAURIG, P.A., and
10 SCOTT D. BERTZYK

11 **UNITED STATES DISTRICT COURT**

12 **DISTRICT OF NEVADA**

13 FRIAS HOLDING COMPANY, a
14 corporation; and MARK A. JAMES, an
individual,

15 Plaintiffs,

16 vs.

17 GREENBERG TRAURIG, LLP, a limited
18 liability partnership, GREENBERG
TRAURIG, P.A., a professional
19 association, SCOTT D. BERTZYK, an
individual, DOES 1 through X; and ROE
20 ENTITIES XI through XX, inclusive,

21 Defendants.

CASE NO. 2:11-CV-160-GMN-(VCF)

**DEFENDANTS' NOTICE OF MOTION
AND MOTION FOR CLARIFICATION OF
THE COURT'S RULING ON MOTION TO
DISMISS; MEMORANDUM OF POINTS
AND AUTHORITIES; AND
DECLARATION OF DYLAN RUGA, IN
SUPPORT THEREOF**

[[PROPOSED] ORDER filed/lodged
concurrently herewith]

1 TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:
2 NOTICE IS HEREBY GIVEN that Defendants Greenberg Traurig, LLP, Greenberg Traurig,
3 P.A., and Scott Bertzyk (collectively, "Defendants") will and hereby do move the Court for
4 clarification regarding the Court's September 27, 2012 Order (Docket No. 37) certifying, to the
5 Nevada Supreme Court, the potentially dispositive question of whether Nevada law recognizes an
6 exception to the common law litigation privilege for legal malpractice and professional
7 negligence actions (the "Certified Question").

8 Defendants seek clarification with respect the status of this case, pending the resolution of
9 the Court's Certified Question and respectfully request that the case be stayed pending this
10 resolution.

11 This motion is based upon this Notice of Motion and Motion, the attached Memorandum
12 of Points and Authorities, the Declaration of Dylan Ruga filed concurrently herewith, the
13 pleadings, files and records in this case and such further evidence and oral argument as may be
14 presented by Defendants prior to or at the hearing on the motion.

15
16 Dated: December 18, 2012

17 STEPTOE & JOHNSON LLP
18 Michael P. McNamara
19 Dylan Ruga

20 BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 Kirk B. Lenhard

22 By: /s/ Dylan Ruga
23 DYLAN RUGA

24 Attorneys for Defendants
25 GREENBERG TRAURIG, LLP,
26 GREENBERG TRAURIG, P.A., and
27 SCOTT D. BERTZYK
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the interest of judicial economy and the conservation of resources, Defendants bring this motion for clarification of the Court's September 27, 2012 Order relating to Defendants' motion to dismiss.

Defendants argued in their motion to dismiss, among other things, that each of Plaintiffs' claims are barred by the litigation privilege. In its Order, the Court:

1. Certified to the Nevada Supreme Court the question of whether Nevada law recognizes an exception to the litigation privilege for legal malpractice actions; and

2. Permitted Defendants to renew their motion to dismiss, and the litigation privilege issue, with this Court following the Supreme Court's decision.

However, the Court did not expressly stay the case pending the resolution of this potentially dispositive issue by the Supreme Court. Defendants respectfully request that the Court issue an order clarifying its ruling and stay this case pending the Supreme Court's decision.

II. BACKGROUND

On October 26, 2011, Defendants filed a motion to dismiss Plaintiffs' First Amended Complaint. *See* Docket No. 30 ("Defendants' Motion to Dismiss"). Defendants argued, among other things, that Plaintiffs' claims are barred by Nevada's litigation privilege. *See id.* at pg. 15.

On September 27, 2012, the Court issued its ruling on the Motion to Dismiss. *See* Docket No. 37 (the "Order"). The Court stated that "most, if not all, of Plaintiffs' claims rely on statements made during the course of" a litigation and "a dispositive question exists whether those statements are privileged." *See id.* at pg. 12 (emphasis added). However, the Court found no controlling Nevada Supreme Court authority regarding the existence of a legal malpractice exception to the litigation privilege and certified the following question (the "Certified Question") to the Nevada Supreme Court:

Whether Nevada law recognizes an exception to the common law litigation privilege for legal malpractice and professional negligence actions.

See id. at pg. 14. The Court denied Defendants' motion to dismiss without prejudice but granted

1 Defendants permission to renew the Motion to Dismiss and “renew the issue regarding litigation
2 privilege within thirty (30) days of the resolution of the Court’s Certified Question to the Nevada
3 Supreme Court.” *Id.* at pgs. 1, 14.

4 The Court did not expressly stay the action pending this resolution of this potentially
5 dispositive issue.

6 **III. DISCUSSION**

7 Defendants respectfully request that the Court clarify its Order and stay this lawsuit
8 pending the resolution of the Certified Question by the Nevada Supreme Court. “The power to
9 stay proceedings is incidental to the power inherent in every court to control the disposition of the
10 causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”
11 *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). Each of the allegedly “false and defamatory”
12 statements allegedly made by Mr. Bertzyk about Mr. James and Mr. James’ law firm were made
13 in the course of a judicial proceeding. If the Supreme Court finds that these statements are
14 privileged, then each of Plaintiffs’ claims should be dismissed. Unless this matter is stayed, the
15 parties and the Court will risk unnecessarily incurring resources pending the Supreme Court’s
16 decision whereas neither party will be prejudiced by such a stay.

17 **A. Clarification Regarding a Stay in This Matter Is Necessary.**

18 Based on the following procedural posture of this case, Defendants reasonably believed
19 that a stay was implicit in the Court’s Order:

- 20 • On November 29, 2010, the case was filed in state court;
- 21 • On January 31, 2011, Defendants removed the case to federal court [Dkt. No. 1];
- 22 • On February 7, 2011, Defendants moved to dismiss the complaint [Dkt. No. 9];
- 23 • On September 26, 2011, the Court granted Defendants’ motion to dismiss without
24 prejudice [Dkt. No. 26];
- 25 • On October 12, 2011, Plaintiffs filed a First Amended Complaint (“FAC”) [Dkt.
26 No. 27];
- 27 • On October 26, 2011, Defendants moved to dismiss the FAC [Dkt. No. 30];
- 28 • On September 27, 2012, the Court denied Defendants’ motion to dismiss the FAC

without prejudice, pending resolution of the Certified Question [Dkt. No. 37];

- To date, the Court has not set a Scheduling Conference or issued a Scheduling Order; and
- To date, the parties have not had a Rule 26(f) conference.

Declaration of Dylan Ruga, ¶ 2.

In short, this case has been pending for over two years and the parties have not engaged in any discovery. Now that the parties are awaiting resolution of the Certified Question, which could dispose of the matter entirely, Defendants reasonably assumed that discovery was stayed. Ruga Decl., ¶ 3.

Nevertheless, on or about December 12, 2012, Plaintiffs' counsel indicated for the first time that Defendants should immediately file an answer, and discovery should commence, because, procedurally, the motion to dismiss was denied. Ruga Decl., ¶ 4.

In light of the foregoing, clarification is necessary here because ambiguity remains about whether the action is stayed pending resolution of the Certified Question by the Supreme Court. Ruga Decl., ¶ 5. Where "the parties have identified a ruling by the Court that is ambiguous, contradictory, or otherwise uncertain, so as to impede forward progress in the case, clarification is warranted." *Mountain View Hosp., L.L.C. v. Sahara, Inc.*, No. 4:07-cv-464-BLW, 2012 WL 397704, at *2 (D. Idaho Feb. 7, 2012).

B. Good Cause Exists to Stay This Case Pending a Decision from the Nevada Supreme Court on the Certified Question.

In its Order, the Court found that "most, if not all, of Plaintiff's claims rely on statements made during" a judicial proceeding and if these statements are privileged, "one or more of Plaintiffs' claims may be dismissed with prejudice." Order, at pg. 12. However, the Court could find no controlling precedent relating to whether there is an exception to this litigation privilege in legal malpractice actions.

A stay of this proceeding pending resolution of the Certified Question by the Supreme Court is necessary to prevent the unnecessary waste of resources by the parties and the Court in the interim. This stay would also be in line with courts' orders in similar procedural situations.

1 *See, e.g., Harding v. Cianbro Corp.*, 436 F.Supp.2d 153, 157 & n.5 (D.Me 2006) (discussing
2 court's granting of stay pending resolution of certified question).

3 Neither party would be prejudiced by this stay. The Court has already ordered that
4 Defendants are permitted to renew their motion to dismiss following the Supreme Court's
5 decision and the parties can litigate this matter at that point with the benefit of the Supreme
6 Court's guidance on this critical issue.

7 **IV. CONCLUSION**

8 Based on the foregoing, Defendants respectfully request that the Court clarify its Order
9 and stay this case pending the Supreme Court's resolution of the Certified Question.

10
11 Dated: December 18, 2012

STEPTOE & JOHNSON LLP
Michael P. McNamara
Dylan Ruga

13 BROWNSTEIN HYATT FARBER SCHRECK, LLP
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15 By: /s/ Dylan Ruga

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